

STATE OF MICHIGAN
COURT OF APPEALS

FAIRVIEW BUILDERS, INC.,

Plaintiff/Counter-Defendant-
Appellant,

V

GARY M. BIRETA and LORENA K. BIRETA,

Defendants/Counter-Plaintiffs-
Appellees,

and

FIRST FEDERAL OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED

March 31, 2005

No. 251470

Lapeer Circuit Court

LC No. 99-027191-CH

Before: Fort Hood, P.J., and Griffin and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment awarding Gary and Lorena Bireta (defendants) damages, costs, and attorney fees. We remand for further proceedings. This case is being decided without oral argument pursuant to MCR 7.214(E).

This litigation arises from the construction of defendants' residence. Plaintiff alleged that defendant homeowners, the Biretas, failed to pay for services rendered. However, defendants countered that plaintiff failed to perform as required under the contract. Following a nine-day bench trial, the trial court concluded that plaintiff failed to perform as required and granted a judgment in favor of defendant homeowners.

Plaintiff's claim of appeal does not challenge the assessment of liability, but rather the award of damages.¹ Plaintiff contends that the trial court erred as a matter of law in computing

¹ Indeed, plaintiff's brief on appeal contends that it "accept[s] the trial court's findings of fact, as set forth in the trial court's [o]pinion."

damages. Specifically, plaintiff alleges that the trial court's award of \$54,000 in damages to defendants should have been essentially set off against the remainder due and owing on the contract price. Therefore, a proper computation would have resulted in an award of \$27,968.94 *to plaintiff*. We remand for proceedings consistent with this opinion.

Although plaintiff directs this panel to the examination of the trial court's oral statements at the motion for clarification and concludes that an error solely at law occurred, we would be remiss in failing to place the trial court's ultimate written judgment in context. The parties' assessment of the status of the litigation diverged substantially. Plaintiff alleged that it entered into a written contract to construct a home for defendants in accordance with specifications delineated in the contract. It was alleged that defendants had selected a model home as the basis for the construction of their home, albeit with some modifications. Plaintiff alleged that the contract was substantially performed when defendants repudiated. It was alleged that defendants unreasonably refused to accept the performance of the contract where only minor corrections were needed. Defendants alleged that there were substantial defects in the construction of the home, which included the incorrect installation of windows in the home, the brickwork, and the shortage of square footage in the construction of the home.

Although plaintiff asserted that only minor items were left to perform on the home construction, the trial court found proof of the following at trial:

1. the wrong windows were installed
2. the brick was improperly installed and the[y] needed to be completely replaced
3. the east wall of the great room was inadequately framed with 2X 4 construction rather than the 2 X 6 called out in the plans
4. the interior needs to be repainted
5. the mast bath tub needs to be removed, reinstalled
6. the house needs to be substantially re-dry-walled
7. the heating and cooling system has to be fixed
8. the granite counter top in the island is stained
9. the tile is cracked and falling away in the master bath, the grout is two different colors
10. the paved driveway has failed and broken away in large measure
11. the house is 255 square feet smaller than it was supposed to be

The trial court rejected plaintiff's contention that defendants' rejection of the work quality was unreasonable. The trial court held that plaintiff was given ample opportunity to correct the defective work. The trial court noted that quality was below standards, as evidenced by the testimony of two inspectors, and rejected plaintiff's contention that the contract was

substantially performed. The trial court held that defendants did not waive objections to the contract specifications and concluded that plaintiff could not maintain a claim for quantum meruit because a written contract governed the parties' transaction. Despite the factual findings and itemization of the defective work performed by plaintiff, the trial court did not correlate a damage award amount to the defective work or to the violation of the Builders Trust Fund. Rather, the trial court's written opinion addressed damages by concluding:

This Court further finds that Plaintiff/Counter Defendant, Fairview, failed to follow the plans and specifications and/or failed to perform a substantial part of the work in a workmanlike manner in many instances and violated Builders Trust Fund. The amount of damages awarded to Defendants/Counter Plaintiffs, Biretas, is \$136,968[.]94, plus reasonable attorney fees.

Plaintiff objected to defendants' attempt to enter a judgment following the trial court's findings and conclusions as set forth in the written opinion. Plaintiff asserted that the trial court's opinion did not address plaintiff's complaint and sought clarification regarding how the damage award had been calculated. At oral argument, the trial court stated how the damage award had been determined:

The Court's position on the amount of \$136,968.94 was the Court's coming up with that figure, since during the course of this trial, which was a long drawn-out matter, and it involved many numbers and many figures throughout this situation, that the Court took approximately whatever was due left on the contract, which is in the \$60,000 range, somewhere in there, the Court took that figure, whatever was left on the balance that Biretas were due Mr. Furnari and Fairview Builders for the final completion based upon contract specifications, whatever that amount was – because the Court did rule there was a breach of contract. They didn't get what they bargained for. Therefore, whatever that amount was, the Court took that amount, plus the amount that was testified by the Plaintiff's own expert, that it would have cost approximately \$54,000 to rectify the damages or the inadequacies that were performed by Fairview Builders. So, adding those two figures together the Court came up with \$136,968.94.

And again, the issue of the final payments to the Biretas to Mr. Furnari and Fairview Builders, that issue was moot since the contract was breached; therefore, they didn't have to pay that final amount. And the Court determined that not only did they not get what they bargained for but they also have to remedy what was done up to that point by Fairview Builders. So the Court dealt more specifically with each one of the issues in regard to breach of contract, fraud, misrepresentation and all of those things. But as far as the raw numbers, the Court, giving every benefit of the doubt to the Plaintiff, used the Plaintiff's numbers, used those numbers, and that's where the Court came up with \$136,000.

The written judgment signed by the trial court expressly provided that plaintiff did not recover any award on the claims raised in the complaint:

IT IS HEREBY ORDERED AND ADJUDGED that with respect to Plaintiff/Counter-Defendant FAIRVIEW BUILDERS, INC.'S claims against the

Defendants/Counter-Plaintiffs GARY AND LORENA BIRETA for breach of contract, lien foreclosure and quantum meruit, the same are considered and dismissed as there is no cause of action;

Despite this written judgment of no cause of action, plaintiff relies on the oral statements at the motion for clarification for the contention that judgment should have been rendered in its favor. Based on our review of the law addressing damages, we remand for further development of the award of damages.

A trial court's damage award in a bench trial is reviewed for clear error. *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002). "Clear error exists where, after a review of the record, the reviewing court is left with a firm and definite conviction that a mistake has been made." *Id.* However, it is the function of the trier of fact to resolve questions of credibility and intent. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 174; 530 NW2d 772 (1995). A damage award is not clearly erroneous where the damage award was within the range of evidence presented, and the trial court was aware of the issues in the case and appropriately applied the law. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 516; 667 NW2d 379 (2003). Remand is warranted where the trial court's dispositional holding is insufficient for this Court to determine whether the trial court reached the proper result on the basis of its findings of fact. *Jackson v Thompson-McCully Co*, 239 Mich App 482, 489; 608 NW2d 531 (2000).

In an action based on contract, the parties are entitled to the benefit of the bargain as set forth in the agreement. *Davidson v General Motors Corp*, 119 Mich App 730, 733; 326 NW2d 625 (1982) mod on reh 136 Mich App 203; 357 NW2d 59 (1984). "The proper measure of damages for breach of contract is, therefore, the pecuniary value of the benefits the aggrieved party would have received if the contract had not been breached." *Id.* The intent of an award for damages in a breach of contract action is to place the plaintiff or counterplaintiff in as good a position as he would have occupied if the terms of the contract had been fulfilled. *Goodwin v Orson E Coe Pontiac, Inc*, 62 Mich App 405, 412; 233 NW2d 598 (1975). The value of performance and damages should be equal. *Id.* at 412-413. However, the injured party should not obtain a windfall; that is, he should not be placed in a better position as a result of the breach. *Id.* at 413. Thus, any mitigation or savings to the injured party should be deducted from any award. *Id.*

Plaintiff contends that the cost of curing the defective conditions of the constructed home was merely \$54,000.² Consequently, to avoid a windfall to defendant homeowners, *Goodwin, supra*, the damage award to cure the defects (or \$54,000) must be set off against the remainder of the contract price, not added to the remaining contract price. However, on this record, the trial

² We note that the measure of damages may be a sum necessary to make the building conform to the plans and specifications where the contract is substantially completed. *Kokkonen v Wausau Homes, Inc*, 94 Mich App 603, 615; 289 NW2d 382 (1980). However, plaintiff did not contest the trial court's factual findings, and the trial court expressly rejected plaintiff's argument that the performance of the contract substantially complied with the specifications.

court expressly delineated eleven deficiencies that could not be classified as minor “punch list items.” We note that many of this items are readily calculable.³ In addition to the eleven deficiencies in construction, the trial court cited to eighteen workmanship issues. The trial court did not make express calculable findings with regard to the cost of finishing the home to the specifications and the cost of curing the defective conditions presented in the home as caused by plaintiff. Moreover, the trial court did not conclude that the opinion of plaintiff’s expert or an expert for the defense encompassed all of the items found to be deficient by the trial court. Furthermore, we note that the trial court could reach a damage award by examining the difference between the value of the building as tendered and the reasonable value of what was to be built. *Kokkonen v Wausau Homes, Inc*, 94 Mich App 603, 615; 289 NW2d 382 (1980). Accordingly, we remand this litigation to the trial court for a determination of the computation of damages that comports with the trial court’s factual findings. *Jackson, supra*.

Remanded with regard to the calculation of damages, affirmed with regard to the trial court’s factual findings because the parties have not contested the findings on appeal. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Richard Allen Griffin
/s/ Pat M. Donofrio

³ For example, the cost to replace windows and the cost of the reduction of 255 square feet of the size of the home can be easily determined.